

FILE COPY

STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF  
DISCIPLINARY PROCEEDINGS AGAINST

FRANCOIS J. SACULLA, M.D.

LS 9507111 MEB

Respondent

ORDER DENYING PETITION

TO: Mary L. Woehrer, Esq.  
8145 West Wisconsin Avenue  
Wauwatosa, WI 53213

John R. Zwieg, Esq.  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708

On September 18, 1997, the Medical Examining Board issued its Final Decision and Order in this case, resolving all substantive matters in issue. The board's Order provided in part that Dr. Saculla was to refrain from the practice of medicine and surgery in Wisconsin until such time that he participated in a psychological evaluation to be conducted by Anthony Kuchan, Ph.D., a Milwaukee area psychologist.

By letter dated November 18, 1997, the board was notified by Dr. Kuchan that for personal and professional reasons, he would be unable to conduct the required evaluation. Under cover of her letter dated November 27, 1997, Mary L. Woehrer, counsel to Dr. Saculla, submitted a list of six psychologists for possible approval by the board in substitution for Dr. Kuchan. The board considered the matter at its meeting of December 18, 1997, and orders as follows:

ORDER

NOW, THEREFORE, IT IS ORDERED that Charles Lodi, Ph.D., is substituted for Anthony Kuchan, Ph.D., in satisfaction of the board's September 18, 1997, Order.

IT IS FURTHER ORDERED that all other terms and conditions of the board's Final Decision and Order in this matter dated September 18, 1997, shall remain in full force and effect.

Dated this 26 day of Dec, 1997.

STATE OF WISCONSIN MEDICAL EXAMINING BOARD

by

Glenn Hoberg, D.O., Secretary

STATE OF WISCONSIN  
DEPARTMENT OF REGULATION AND LICENSING  
BEFORE THE MEDICAL EXAMINING BOARD

In the Matter of Disciplinary Proceedings Against

Francois J. Saculla, M.D.,

AFFIDAVIT OF MAILING

Respondent.


STATE OF WISCONSIN    )  
                                  )  
COUNTY OF DANE        )

I, Kate Rotenberg, having been duly sworn on oath, state the following to be true and correct based on my personal knowledge:

1. I am employed by the Wisconsin Department of Regulation and Licensing.

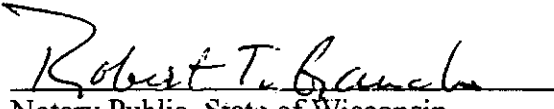
2. On January 6, 1998, I served two Orders Denying Petition dated December 26, 1997, LS9507111MEB, upon the Respondent Francois J. Saculla's attorney by enclosing a true and accurate copy of the above-described document in an envelope properly stamped and addressed to the above-named Respondent's attorney and placing the envelope in the State of Wisconsin mail system to be mailed by the United States Post Office by certified mail. The certified mail receipt number on the envelope is P 221 157 683.

Mary L. Woehrer, Attorney  
8145 W. Wisconsin Avenue  
Wauwatosa WI 53213

  
\_\_\_\_\_  
Kate Rotenberg  
Department of Regulation and Licensing  
Office of Legal Counsel

Subscribed and sworn to before me

this 6th day of January, 1998.

  
\_\_\_\_\_  
Notary Public, State of Wisconsin  
My commission is permanent.

## NOTICE OF RIGHTS OF APPEAL

TO: MARY L WOEHRRER ATTY

You have been issued a Final Decision and Order. For purposes of service the date of mailing of this Final Decision and Order is 1/6/98. Your rights to request a rehearing and/or judicial review are summarized below and set forth fully in the statutes reprinted on the reverse side.

### A. REHEARING.

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences on the day of personal service or the date of mailing of this decision. The date of mailing of this Final Decision is shown above.

A petition for rehearing should name as respondent and be filed with the party identified below.

A petition for rehearing shall specify in detail the grounds for relief sought and supporting authorities. Rehearing will be granted only on the basis of some material error of law, material error of fact, or new evidence sufficiently strong to reverse or modify the Order which could not have been previously discovered by due diligence. The agency may order a rehearing or enter an order disposing of the petition without a hearing. If the agency does not enter an order disposing of the petition within 30 days of the filing of the petition, the petition shall be deemed to have been denied at the end of the 30 day period.

A petition for rehearing is not a prerequisite for judicial review.

### B. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in section 227.53, Wisconsin Statutes (copy on reverse side). The petition for judicial review must be filed in circuit court where the petitioner resides, except if the petitioner is a non-resident of the state, the proceedings shall be in the circuit court for Dane County. The petition should name as the respondent the Department, Board, Examining Board, or Affiliated Credentialing Board which issued the Final Decision and Order. A copy of the petition for judicial review must also be served upon the respondent at the address listed below.

A petition for judicial review must be served personally or by certified mail on the respondent and filed with the court within 30 days after service of the Final Decision and Order if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. Courts have held that the right to judicial review of administrative agency decisions is dependent upon strict compliance with the requirements of sec. 227.53 (1) (a), Stats. This statute requires, among other things, that a petition for review be served upon the agency and be filed with the clerk of the circuit court within the applicable thirty day period.

The 30 day period for serving and filing a petition for judicial review commences on the day after personal service or mailing of the Final Decision and Order by the agency, or, if a petition for rehearing has been timely filed, the day after personal service or mailing of a final decision or disposition by the agency of the petition for rehearing, or the day after the final disposition by operation of the law of a petition for rehearing. The date of mailing of this Final Decision and Order is shown above.

The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is a person aggrieved by the decision, and the grounds specified in section 227.57, Wisconsin Statutes, upon which the petitioner contends that the decision should be reversed or modified. The petition shall be entitled in the name of the person serving it as Petitioner and the Respondent as described below.

### SERVE PETITION FOR REHEARING OR JUDICIAL REVIEW ON:

STATE OF WISCONSIN MEDICAL EXAMINING BOARD

1400 East Washington Avenue

P.O. Box 8935

Madison WI 53708-8935

FILE COPY

STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

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IN THE MATTER OF  
DISCIPLINARY PROCEEDINGS AGAINST

FRANCOIS J. SACULLA, M.D.

LS 9507111 MEB

Respondent

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ORDER DENYING PETITION

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TO: Mary L. Woehrer, Esq.  
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Wauwatosa, WI 53213

John R. Zwieg, Esq.  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708

A *Scheduling Order* was filed on October 21, 1997, scheduling the filing of briefs on the issue of assessment of costs in the above-captioned matter. Mr. Zwieg's brief was scheduled to be filed on November 4, 1997; Ms. Woehrer's brief was scheduled to be filed on January 5, 1998; and Mr. Zwieg's reply was scheduled for January 30, 1998.

On November 13, 1997, Ms. Woehrer filed her *Notice of Motion and Motion to Dismiss for Violations of the Scheduling Order*. The Motion requests that the motion of the Division of Enforcement for the assessment of additional costs in this matter be dismissed, based upon failure by Mr. Zwieg to file his brief by the November 4, 1997, deadline. On November 14, 1997, Mr. Zwieg filed *Complainant's Response to Respondent's Motion to Dismiss for Violation of the Scheduling Order*. Also filed on that date was *Complainant's Brief in Support of Request that Respondent be Ordered to Pay the Costs of the Proceeding*.

The board considered respondent's Petition on December 18, 1997. Based upon the Motion, and upon other information of record herein, it is ordered as follows:

ORDER

NOW, THEREFORE, IT IS ORDERED that respondent's Motion to Dismiss for Violations of the Scheduling Order be, and hereby is, denied.

IT IS FURTHER ORDERED that the deadline for filing Ms. Woehrer's brief is extended from January 5, 1998, until February 5, 1998.

IT IS FURTHER ORDERED that the deadline for filing Mr. Zwieg's reply brief is extended until March 4, 1998.

#### DISCUSSION

In his Motion to Dismiss, respondent correctly points out that complainant failed to file his brief by the deadline established by the board's Scheduling Order. Respondent's Motion then states as follows:

Secs. 802.10 Wis. Stats. states that violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03 Wis. Stats. Sec. 804.12 Wis. Stats. allows for dismissal of claims when scheduling orders are violated. Since the clear reading of Attorney Austin's order was mandatory -- Mr. Zwieg's brief **shall be filed** by November 4, 1997, the Department is in clear violation of the order. Dismissal and preclusion from filing this brief is the appropriate remedy under Wisconsin law. (emphasis in original)

In his response, complainant first contends that respondent's reliance on sec. 802.10, Stats., is misplaced in that it is inapplicable to administrative proceedings. That is correct. Sec. 802.10(1), Stats., states as follows:

**802.10 Calendar practice. (1) APPLICATION.** This section applies to all actions and special proceedings except appeals taken to circuit court, actions seeking the remedy available by certiorari, habeas corpus, mandamus, prohibition and quo warranto, actions in which all defendants are in default, provisional remedies, and actions under ss. 49.90 and 66.12 and chs. 48, 102, 108, 227, 348, 767, 778, 799 and 812, and proceedings under chs. 851 to 882.

"Actions" and "special proceedings" are defined at sec. 801. as follows:

**801.01 Kinds of proceedings; scope of chs. 801 to 847. (1) KINDS.** Proceedings in the courts are divided into actions and special proceedings. "Action", as used in chs. 801 to 847, includes "special proceeding" unless a specific provision of procedure in special proceedings exists.

**(2) SCOPE.** Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule. Chapters 801 to 847 shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding.

In addition to the statutory authority under sec. 802.10, Stats., the courts also have inherent authority to impose sanctions for failure to comply with their lawful orders, and such power extends to dismissal of a complaint in appropriate circumstances.

The trial court has both the inherent power and statutory authority to sanction parties for failure to comply with procedural statutes or rules and for failure to obey

court orders. *in re Marriage of Gerrits v. Gerrits*, 167 Wis.2d 429, 446 (Ct.App. 1992), 482 N.W.2d 134

We construe the notice of the pretrial conference in view of the court rule [requiring a pretrial conference] as an order of the court binding upon counsel. The question is the power of the court to dismiss the complaint on its merits as a penalty for the failure to comply with the order. It is considered well established that a court has the inherent power to resort to a dismissal of an action in the interest of orderly administration of justice, the general control of the judicial business before it is essential to the court if it is to function. "Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort." *Latham v. Casey & King Corp.*, 23 Wis.2d 311, 314 (1964), 127 N.W.2d 225

The considerations described in *Latham* are equally important to the administration of formal proceedings heard in administrative forums. Accordingly, the consensus appears to be that the power to impose sanctions inheres in administrative forums to the same extent that it inheres in the courts.

But while the board may have discretionary authority to dismiss a proceeding such as the present one for failure to comply with the board's scheduling order, its discretion is by no means unfettered. As stated in *Hudson Diesel, Inc. v. Kenall*, 194 Wis.2d 531, 542 (Ct.App. 1995), 535 N.W.2d 65:

Because dismissal of a complaint terminates the litigation without regard to the merits of the claim, dismissal is an extremely drastic penalty that should be imposed only where such harsh measures are necessary. *Trispel v. Haefer*, 89 Wis.2d 725, 732, 279 N.W.2d 242, 245 (1979). In *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859, 865 (1991), our supreme court held that dismissal is appropriate only where the non-complying party's conduct is egregious or in bad faith and without a clear and justifiable excuse.

It may not be concluded that complainant's failure to timely file his response is either egregious or in bad faith. Complainant's attorney volunteered to submit his brief on the merits of the matter on November 4, 1997, just two weeks following the scheduling conference. Respondent's attorney, indicating that her calendar would not permit her to work on her brief during the month of November, requested that she be permitted until January 5, 1997, to file her brief, and complainant did not object. In his response to the respondent's Motion, Mr. Zwieg states:

Complainant's counsel concedes that it would have been better practice to call Respondent's counsel and explain the difficulty [in filing by November 4] and seek an extension of the time to file. However, Respondent's counsel had said that she would not be able to work on the response during November. Therefore, Complainant's counsel had no reason to believe that the short delay of 10 days would have any negative impact on anyone. Complainant still has 52 days from the date of filing to draft her reply brief.

Were this a situation where respondent was somehow prejudiced by complainant's failure to file on time, a stronger argument could be made for strong sanctions. Respondent does not even argue that he has been prejudiced, however, and it is probably not possible for him to do so. This is not a case where vindication of respondent's professional reputation is at stake; the substantive findings in the matter have already been made. It is also not a situation where a delay in deciding the matter could result in a delay in providing respondent an administrative remedy. It is not to put too fine a point on it to say that respondent would not be prejudiced in that regard if the decision on costs was never issued. It is probably not even a situation where respondent is prejudiced as to his counsel's ability to file her reply brief within the scheduled time; she had previously indicated that she was unable to work on her brief during November in any event. However, it is possible that complainant's delay in filing his brief, along with the pendency of this decision on respondent's Motion, has somehow created a hardship in terms of Ms. Woehrer's ability to timely file respondent's brief, and the deadline for filing the brief is therefore extended to February 13, 1997. The time for filing complainant's reply is extended correspondingly.

Dated this 26 day of Dec, 1997.

STATE OF WISCONSIN  
MEDICAL EXAMINING BOARD

by Glenn Hoberg  
Glenn Hoberg, D.O.  
Secretary

STATE OF WISCONSIN  
DEPARTMENT OF REGULATION AND LICENSING  
BEFORE THE MEDICAL EXAMINING BOARD

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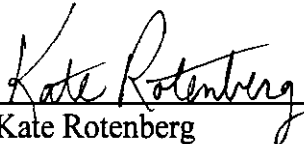
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                                  )  
COUNTY OF DANE        )

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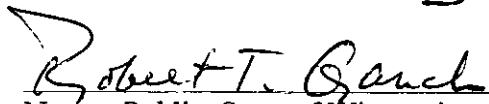
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Mary L. Woehrer, Attorney  
8145 W. Wisconsin Avenue  
Wauwatosa WI 53213

  
\_\_\_\_\_  
Kate Rotenberg  
Department of Regulation and Licensing  
Office of Legal Counsel

Subscribed and sworn to before me

this 6th day of January, 1998.

  
\_\_\_\_\_  
Notary Public, State of Wisconsin  
My commission is permanent.



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